UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on behalf of himself and others similarly situated, Plaintiff, vs. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC; and DOES 1 through 25, inclusive Defendants.	CASE NO. 08-CV-1173-H (CAB) ORDER CERTIFYING CONSTITUTIONAL CHALLENGE TO STATE STATUTE IN ACCORDANCE WITH 28 U.S.C. § 2403 AND FED. R. CIV. P. RULE 5.1(b)

On July 2, 2008, defendants removed this action from San Diego Superior Court, asserting jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2), 1453. (See Doc. Nos. 1-2.) On July 10, 2008, defendant New Albertson's, Inc. filed a motion to dismiss along with notice of a constitutional challenge to two California statutes, in accordance with Federal Rule of Civil Procedure 5.1(a)(1)(B). (Doc. Nos. 6, 8.) This rule requires a party to file such a notice when "a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity." Accordingly, the Court enters this order to certify the challenge according to Rule 5.1(b), which states that "[t]he court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned." Fed. R. Civ. P. 5.1(b). The relevant portion of that statute, 28 U.S.C. § 2403(b), states:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Accordingly, the Court certifies the constitutional challenge to the Attorney General of California. Defendant New Albertson's Inc. asserts that the First Amendment to the United States Constitution bars the application of two California statutes to conduct at issue in this case. The statutes are the California Confidentiality of Medical Information Act, Cal. Civil Code § 56, *et seq.*, and the California Unfair Competition Law, Cal. Business & Professions Code § 17200, *et seq.* As characterized by New Albertson's, Inc.'s notice, the conduct at issue is its alleged sale of "anonymized" pharmacy records to third parties, where "anonymized" means that all such records have been stripped of all "medical information," as defined in Cal. Civil Code § 56.05(g), prior to their transmission to any third party. (See Notice of Constitutional Challenge to State Statutes, Doc. No. 8.)

Under Rule 5.1(c), "[u]nless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier." Fed. R. Civ. P. 5.1(c). "Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional." Id. New Albertson's Inc.'s motion to dismiss is currently set for a hearing on August 11, 2008 at 10:30 a.m. At this time, the Court does not continue the hearing, alter the parties' briefing schedule, or extend the Attorney General's time to intervene. If Court becomes inclined to accept the constitutional challenge, however, the Court will postpone entry of any final judgment until the Attorney General has had an adequate opportunity to intervene. At this time, the Court expresses no opinion on the merits of the constitutional challenge.

IT IS SO ORDERED.

DATED: July 11, 2008

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

COPIES TO:
All parties of record.

and

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